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Supreme Court, U.S.
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No. 16-258

IN THE

Supreme Court of the United States

DIGNITY HEALTH, ET AL.,

Petitioners,

v.

STARLA ROLLINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") provides significant protections for employees' pensions, but it includes an exemption for a "church plan." 29 U.S.C. §1003(b)(2). A "church plan" is a pension or welfare plan "established and maintained ... by a church," *id.* §1002(33)(A), which "includes" a plan "maintained" by a pension board or similar administrative organization controlled by or associated with a church, *id.* §1002(33)(C)(i). All three courts of appeals to consider the issue have concluded without dissent that the exemption does not extend to plans that were not "established ... by" a church, and that therefore a pension plan established by a giant health care provider like the one involved here is not exempt from ERISA.

The question presented is:

Whether a pension plan for employees of a giant health-care provider is exempt from—and therefore its participants are unprotected by—ERISA, even though there is no genuine dispute that the plan was not "established" by a church.

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STATEMENT

Petitioner Dignity Health ("Dignity") is the fifth largest provider of healthcare in the United States. Its hospitals and other medical facilities employ more than 60,000 people. Dignity is not a church. The petition represents petitioners' attempt—in the face of consistent rulings (without dissent) by the only three courts of appeals to address the issue—to exempt Dignity's pension plan from ERISA on the ground that it is a "church plan." 29 U.S.C. §1003(b)(2). This case presents the same question as *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016), *petition for cert. filed*, July 15, 2016 (No. 16-74); and *Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2015), *petition for cert. filed*, July 18, 2016 (No. 16-86). ERISA's definition of a "church plan" makes clear that plans like Dignity's—which were not established by any church—are not exempt, as the court below and each of the other courts of appeals that have ruled on the issue have concluded. The petition should be denied.

1. ERISA was designed to remedy "the lack of employee information and adequate safeguards" and the "inadequacy of current minimum standards" for pension (and welfare) plans. 29 U.S.C. §1001(a). ERISA "seek[s] to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

ERISA includes an exemption for "church plan[s]." 29 U.S.C. §1003(b)(2). "The term 'church plan' means a plan established and maintained ... for

its employees ... by a church or by a convention or association of churches[.]"[1] 29 U.S.C. §1002(33)(A) (1974). The purpose of that exemption was to avoid "examinations of books and records" that "might be regarded as an unjustified invasion of the confidential relationship ... with regard to churches and their religious activities." S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. The version originally enacted in 1974 temporarily (until 1982) permitted pre-existing plans "established and maintained by a church" to cover employees of church-affiliated agencies. 29 U.S.C. §1002(33)(C) (1974).

In 1980, Congress amended the church-plan exemption to address two concerns. First, churches wanted continuing authority, past 1982, to include employees of church-affiliated agencies in their plans. Second, the requirement that church plans be "maintained" by a church was of concern to certain churches that used distinct financial services organizations (often called "pension boards") to maintain and administer their pension plans. Pet. App. 13a-14a.

To address the 1982 sunset provision, Congress amended the definition of "employee" under the church-plan definition, such that an "employee of a church ... includes ... an employee of an organization ... which is controlled by or associated with a church." 29 U.S.C. §1002(33)(C)(ii)(II); *see also id.* §1002(33)(C)(iii) (church shall be "deemed" employer

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[1] "Church," as used herein, refers to any church or convention or association of churches. It also refers to a synagogue, mosque, or other house of worship.

of such "employee[s]"). Because a "church plan" was still defined as "a plan established and maintained ... *for its employees* ... by a church," *id.* §1002(33)(A) (emphasis added), the amendments allowed churches to include in their benefit plans not only their own employees, but also employees of certain church-associated organizations.

To address churches that maintained their plans through separate organizations, *i.e.*, pension boards, Congress enacted the provision at issue here:

> A plan established and maintained for its employees ... by a church or by a convention or association of churches includes a plan maintained by an organization, ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

Id. §1002(33)(C)(i). A church could now retain the exemption even if it turned over maintenance of its plan to an organization primarily engaged in plan management and controlled by or associated with the church.

2. As of 2012, Dignity was the fifth largest provider of healthcare in the United States, with $10.5

billion in operating revenue and 60,000 employees.[2] Since its founding in 1986, Dignity has grown to include approximately 100 "subordinate corporations and subsidiaries," including some for-profit entities.[3] Its executive officers are compensated in line with executive officers of large publicly traded companies.[4] Dignity's operations are in all significant respects identical to the operations of its nonprofit (and, to a great degree, for-profit) competitors. It imposes no religious test or requirements on its patients or employees.[5] Dignity is not a church.[6]

Until 2012, Dignity was known as Catholic Healthcare West ("CHW"). In that year it was restructured and renamed. The Archbishop of San Francisco, the Most Reverend George Niederauer, issued a statement noting that "[t]he name of the new health system will not suggest a direct association with the Catholic Church or its apostolic works" and that "the restructured corporation will not be recognized as

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[2] C.A. Excerpts of Record ("ER") 832 (Compl. ¶¶37-39), C.A. Supplemental Excerpts of Record ("SR") 99, 101 (Answer ¶¶19, 37-39).

[3] *See* Dignity Health, *2016 Consolidated Financial Statement* ("2016 Financial Statement"), at 50, http://bit.ly/2dQHdIn.

[4] ER-834-35 (Compl. ¶46), SR-103 (Answer ¶46). For example, in 2010, Dignity's President and CEO, CFO, and COO received $5.1 million, $2.9 million, and $2.3 million, respectively, in total compensation. *Id.*

[5] ER-835 (Compl. ¶¶48, 50), SR-103 (Answer ¶¶48, 50).

[6] ER-842 (Compl. ¶76), SR-107 (Answer ¶76); SR-3; SR-56; SR-68; ER-320-21.

Catholic." ER-160. He also later stated that Dignity "would no longer be a sponsored ministry of the Catholic Church—that is, it would become a secular nonprofit health care system governed by a self-perpetuating board, and would change its name to reflect that reality." ER-167. The Diocese of Phoenix, where Dignity operates, issued a statement that Dignity is "a secular" corporation. SR-126. And Dignity's Bylaws state that Dignity is "not subject ... to the ecclesial authority of the Roman Catholic Church." ER-171 (§3.3).

Dignity provides retirement benefits for its employees through the Dignity Health Pension Plan ("the Plan"). ER-554-679, 269. Dignity established the Plan in 1989 as an ERISA-compliant plan, but in 1992 it reversed course and adopted a "retroactive resolution to treat the Plan as a church plan" exempt from ERISA. Pet. App. 5a-6a. The Plan is sponsored by Dignity, SR-153, 162, and is administered by a subcommittee of the Dignity board of directors, SR-105 (Answer ¶63).[7]

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[7] Petitioners' statement of the "Factual Background" (Pet. 7-10) includes many disputed contentions not yet litigated in the courts below, including regarding any alleged authority of "Sponsoring Congregations" over Dignity, its Board, and its retirement plans subcommittee. For example, contrary to petitioners' contentions, Pet. 8, although women religious have two reserved Board seats, they must "serve in an individual capacity and not as a representative" of any "Sponsoring Congregation." ER-172.

Dignity does not claim church-plan status—and thus is subject to ERISA—with respect to other benefit plans, *see* SR-96, 105 (Answer ¶¶3, 65), including the Dignity Health Welfare Benefits Plan, which provides health insurance benefits to more than 46,000 of Dignity's employees.[8]

3. Respondent is a former Dignity employee and a participant in the Plan. She brought this action against Dignity and other Plan fiduciaries on behalf of herself and other Plan participants and beneficiaries. The complaint alleged that defendants violated ERISA by, *inter alia*, underfunding the Plan, ER-855 (Compl. ¶¶127-30); failing to make required disclosures, ER-852-55 (Compl. ¶¶110-25); and breaching their fiduciary duties, ER-859-61 (Compl. ¶¶148-61). Respondent sought a declaration that the Plan is not a church plan, an injunction requiring Dignity to reform the Plan to comply with ERISA and otherwise to satisfy ERISA's requirements, and civil penalties and damages. ER-863-66 (Compl. ¶165).

Among other arguments, respondent alleged that, because the Plan was not "established" by a church, it does not qualify as an exempt church plan. That is the issue decided by the court of appeals, in respondent's favor. Respondent also alleged two alternative, and independent, reasons why the Plan does not qualify as a "church plan" under the statute. *See infra* pp. 36-37. Finally, even if the Plan satisfied those statutory

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[8] *See* Dignity Health Welfare Benefits Plan, *Form 5500* (2015), at 2, http://bit.ly/2dNBlx9.

requirements, respondent alleged that it would nonetheless be subject to ERISA because such a preference for a religiously-affiliated institution, unrelated to any need to accommodate religious faith or practice, would violate the Establishment Clause. *See* ER-862-63 (Compl. ¶163).

4. The district court denied petitioners' motion to dismiss. Pet. App. 26a-42a. After a thorough analysis of the statutory text, Pet. App. 33a-37a, the court concluded that "only a church or a convention or association of churches may establish a church plan." Pet. App. 37a. The court noted that "Dignity's effort to expand the scope of the church-plan exemption" to include any plan maintained by a church-associated organization "stretches the statutory text beyond its logical ends." *Id.* The court concluded that the "legislative history also strongly supports [the] reading ... that the purpose behind [subsection 33(C)(i)] was only to permit churches to delegate the administration of their benefits plans to specialized church pension boards ... ; it was not to broaden the scope of organizations who could *start* a church plan." Pet. App. 39a.

The district court then granted respondent's motion for partial summary judgment, concluding that "[t]here is no genuine dispute of material fact that CHW established the Plan here, and that CHW is not a church." Pet. App. 59a. The court denied Dignity's cross-motion for summary judgment, rejecting Dignity's novel claims that several religious orders were churches and had either "established the Plan" themselves because they controlled CHW at the time, or had "jointly" established the Plan with CHW. Pet. App. 45a.

The district court certified for interlocutory appeal "the question whether an ERISA church plan must be established by a church." Pet. App. 63a-64a.

5. The court of appeals accepted the interlocutory appeal and affirmed. Pet. App. 1a-25a. As a pure matter of statutory language, the court found that "[t]here are two possible readings of subparagraph (C)(i)." Pet. App. 10a. But the court concluded "that the more natural reading ... is that the phrase preceded by the word 'includes' serves only to broaden the definition of organizations that may maintain a church plan. The phrase does not eliminate the requirement that a church plan must be established by a church." *Id.* The court cited the Third Circuit's decision in *Saint Peter's* and the Seventh Circuit's decision in *Advocate*, and noted that "[t]he other circuits that have considered the question agree with this reading." *Id.*

After an extensive review, Pet. App. 13a-15a, the court found "nothing in the legislative history ... to suggest that Congress intended ... to eliminate the requirement that a church plan be established by a church." Pet. App. 15a. "The legislative history is clear that subparagraph (C)(i) addressed only the problem of maintenance by church-controlled or church-affiliated pension boards." Pet. App. 14a.

The court also rejected Dignity's argument that non-precedential, ex-parte IRS letter rulings or hypothesized congressional acquiescence in those rulings (of which there was no reason to believe Congress knew) should alter its conclusion. Pet. App. 18a-20a. Similarly, the court rejected Dignity's argument that subsequently enacted statutes provide that non-

church organizations may establish church plans. Pet. App. 15a-18a.

The court easily disposed of petitioners' argument that they were constitutionally entitled to be treated like a church and therefore qualify for the church-plan exemption. The court noted that "[n]umerous federal statutes have long drawn the distinction between churches and other religious organizations." Pet. App. 22a (citing statutes). Although Dignity argued that the court's reading would "entangle the government in religious matters by requiring it to determine whether religious organizations qualify as churches," Pet. App. 23a, the court explained that an inquiry into religious doctrine is "not require[d] ... and it is not the inquiry that courts or agencies actually employ" in assessing whether an entity qualifies as a church. Pet. App. 24a.

Finally, the court rejected Dignity's argument that the church-establishment requirement "interferes with internal matters of church governance." Pet. App. 24a. As the court explained, religious denominations "are free to operate their agencies under the same organizational structure as their churches; they are also free to allow their agencies to operate separately. Under either organizational form, churches [or conventions or associations of churches] may allow their agencies' employees to participate in their pension plans." *Id.*

The court of appeals exercised its discretion pursuant to 28 U.S.C. §1292(b) and declined to review the district court's conclusions that there was no genuine

dispute of material fact that no church established the Plan. Pet. App. 25a.[9]

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[9] A snippet of a judge's comment at oral argument is not entitled to any weight, and petitioners' reliance on such a snippet from Judge Fletcher (Pet. 14) illustrates the weakness of their position. Moreover, Judge Fletcher did not state that the district court made a "questionable decision" in holding that Dignity established the Plan. *Contra* Pet. 14. Judge Fletcher's comment related to the date on which the Plan was established—specifically, whether it was established on the date that Dignity's board resolved to establish the plan or a number of days later when the initial Plan document was signed. *See* Video of Oral Argument 46:18-33, http://bit.ly/2e0GsZj. As explained in a letter to the court, petitioners did not produce that initial Plan document in discovery until nearly a month after oral argument in the district court on respondents' motion. C.A. Dkt. #92. Nonetheless, that Plan document does not demonstrate any genuine dispute regarding whether Dignity solely established the Plan, a point underscored by the fact that petitioners had not submitted it to the district court in response to respondent's motion. *Id.* Indeed, the document states *inter alia* that the Plan "is made and entered into by Catholic Healthcare West [Dignity] (Sponsor)," *id.*, and therefore *not* by any church or religious order. Finally, reversal of the district court's holding on the "established by" issue would not have "ended the case in Dignity Health's favor." *Contra* Pet. 14. Reversal of summary judgment would have meant, at most, that there was a triable issue of fact with respect to one of respondent's alternative theories as to why the Plan must comply with ERISA. *See supra* pp. 6-7.

REASONS FOR DENYING THE PETITION

This case presents the same question as the petitions in *Advocate*, No. 16-74, and *Saint Peter's*, No. 16-86. As discussed in the Brief in Opposition in *Advocate* (pp. 9-16), the courts of appeals uniformly have agreed that a church plan must be established by a church. They correctly held that giant healthcare corporations like Dignity must provide ERISA-mandated minimum protection and insurance for their employees' pension plans, just like Dignity's competitors must do. Moreover, Dignity's Plan would not qualify as an ERISA-exempt church plan even if the "established by a church" requirement were disregarded, because, *inter alia*, statements by the Catholic Church have made clear that Dignity is not "controlled by or associated with" the Catholic Church. For that reason as well, further review, especially at this interlocutory stage, is unwarranted.

I. THE ONLY THREE COURTS OF APPEALS TO ADDRESS THE ISSUE HAVE AGREED, WITHOUT DISSENT, THAT A CHURCH PLAN MUST BE ESTABLISHED BY A CHURCH

As discussed in the Brief in Opposition in *Advocate* (pp. 9-16), all three courts of appeals that have addressed the issue in this case have reached the same conclusion: subsection 33(A)'s requirement that an ERISA-exempt church plan be "established" by a church was not altered by subsection 33(C)(i)'s specification that a church plan can be "maintained" by a church-affiliated organization that satisfies certain requirements. All three courts rejected the same arguments petitioners make here. The earlier decisions

of two other courts of appeals cited by petitioners did not address the question presented here, and the question presented here remains open in those circuits. There is no conflict.

A. The Third, Seventh, and Ninth Circuits Have All Rejected Petitioners' Arguments Without Difficulty

The Ninth Circuit here "agree[d] with the district court" that, "to qualify for the church-plan exemption ... a plan must have been established by a church *and* maintained either by a church or by a principal-purpose organization." Pet. App. 8a. As explained in the Brief in Opposition in *Advocate* (pp. 9-11), the two other courts that have addressed the question reached the same conclusion, based on the same reasoning. In *Saint Peter's*, the Third Circuit concluded that "[t]he 1980 amendments provided an alternate way of meeting the maintenance requirement by allowing plans maintained by church agencies to fall within the exemption[,] [b]ut they did not do away with the requirement that a church establish a plan in the first instance." 810 F.3d at 180. In *Advocate*, the Seventh Circuit similarly agreed that "the plain language of (33)(C) merely adds an alternative meaning to one of subsection (33)(A)'s two elements—[the] 'maintain' element—but does not change the fact that a plan must still be established by a church." 817 F.3d at 523.

All three courts of appeals carefully examined the legislative history and concluded that there was nothing in it "to suggest that Congress intended, in broadening the definition of organizations that are authorized to maintain a church plan, to eliminate th[e] ...

requirement" that a church plan be established by a church. Pet. App. 15a; *see infra* pp. 30-32. All three courts of appeals rejected the hospital's reliance on non-precedential IRS rulings. *See* Pet. App. 18a-20a; *Advocate*, 817 F.3d at 530-31; *Saint Peter's*, 810 F.3d at 185. All three held that petitioners' Religion Clause arguments were without merit. *See* Pet. App. 20a-24a; *Advocate*, 817 F.3d at 531-32; *Saint Peter's*, 810 F.3d at 186-87. In short, three courts of appeals have examined the arguments that petitioners make here and rejected them, without dissent.

B. The Question Presented Here Was Not Before the Fourth and Eighth Circuits

As explained in the Brief in Opposition in *Advocate* (pp. 11-16), petitioners mistakenly contend that the decisions of the Fourth Circuit in *Lown v. Continental Casualty Co.*, 238 F.3d 543 (4th Cir. 2001), and the Eighth Circuit in *Chronister v. Baptist Health*, 442 F.3d 648 (8th Cir. 2006), conflict with the uniform view of the Third, Seventh, and Ninth Circuits. Neither *Lown* nor *Chronister* conflicts with, or is even in any tension with, the decisions of the latter courts. Petitioners cite no language in *Chronister* that addressed the issue of statutory construction here, and the one sentence they quote from *Lown* was dictum. Neither the Fourth Circuit nor the Eighth Circuit was asked to decide whether a church plan could be established by a non-church organization. Nor did either court engage in any statutory analysis whatsoever regarding whether a church plan must be established by a church; both courts concluded that the plans before them were not church plans because they did not

satisfy other, independent requirements of the church-plan definition.

Moreover, as explained in the Brief in Opposition in *Advocate* (p. 15 n.2), a judge in a subsequent district court case did not conclude that *Lown* was binding on the issue presented here, but instead expressed a concern about departing from "*dicta* [of] appeals courts ... when you're a district judge." *Lann v. Trinity Healthcare Corp.*, No. 14-2237, Hr'g Tr. 25:18-20, Feb. 23, 2015, Dkt. #72 (emphasis added). That the parties in *Trinity* subsequently agreed to preliminary settlement terms (Pet. 23-24)—which provide substantial ERISA-like protections to the plans' participants—reflects nothing more than the particular interests of those unique parties in light of their claims and defenses and the course of that specific litigation. Such a settlement has nothing to do with the existence of a circuit split.

The Fourth and Eighth Circuits therefore are not bound to rule one way or the other on the question presented here. Those courts are likely to have the opportunity to address the question presented here in new cases currently pending in their district courts. *See* Pet. 15-16. There is no reason to believe that, when they do so, they will deviate from the plain meaning of the statutory text and the unanimous decisions of the Third, Seventh, and Ninth Circuits.

II. GRANTING REVIEW WOULD PUT AT RISK DIGNITY'S 60,000 EMPLOYEES AND IS UNWARRANTED AT THIS INTERLOCUTORY STAGE

As this litigation proceeds, Dignity's 60,000 employees must endure the costs and risks of Dignity's

legally inadequate pension plan, while Dignity reaps the competitive advantages in the marketplace of its ability to impose a substandard plan on its employees. No circuit has agreed with petitioners, and there is nothing else that would indicate that petitioners' argument has sufficient merit to warrant this Court's attention at this interlocutory stage.

A. There Is No "Settled Law" that Supports Petitioners' Interpretation

Petitioners argue that further review is warranted because "[i]t has been settled law for well over thirty years that pension plans maintained by otherwise qualifying church-affiliated organizations are exempt from ERISA ... , whether or not a church itself established the plan." Pet. 1. As explained in the Brief in Opposition in *Advocate* (pp. 16-20), however, "[s]ettled law" is created by decisions of courts or, at most, agency rulings that are intended to state the agency's considered view on a subject. As shown above, the law in the courts of appeals is contrary to petitioners' position, and no agency has made any precedential or reliance-worthy rulings on the subject.

1. Petitioners rely on a memorandum issued for internal agency use by the IRS's general counsel in 1982. IRS Gen. Couns. Mem. 39,007, 1983 WL 197946 (Nov. 2, 1982). As explained in the Brief in Opposition in *Advocate* (pp. 17-19), that memorandum expressly instructs that it "is not to be relied upon or otherwise cited as precedent by taxpayers." 1983 WL 197946, at *6. Moreover, the memorandum is not entitled to deference because it was not a result of "formal adjudication or notice-and-comment rulemaking." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). As the

courts of appeals have concluded, it also has no "power to persuade" because it "is based on an obvious misreading of the statutory text, and it ignores the relevant legislative history." Pet. App. 18a-19a; *see Advocate*, 817 F.3d at 530-31; *Saint Peter's*, 810 F.3d at 185. It therefore cannot be taken as "settled law," or, indeed, as "law" in any sense.

2. The same is true of later-issued private letter rulings, which also "may not be used or cited as precedent." 26 U.S.C. §6110(k)(3); *see Advocate*, Br. in Opp'n pp. 18-19.

Despite their current statement that "[t]he IRS confirmed four separate times that the Plan and related plans are ERISA-exempt church plans," Pet. 9, petitioners have elsewhere conceded that the Plan is not currently operating under such a private letter ruling. After its 2012 corporate reorganization as a secular, non-Catholic corporation, Dignity submitted a request for a private letter ruling in which it insisted to the IRS that earlier letter rulings it had obtained were no longer valid. It stated that: (i) the IRS "has not ruled on the same or similar issue for Dignity ... or a predecessor"; (ii) "[n]either [Dignity] nor [its counsel] are aware of any decision or ruling that has considered the precise arrangement presented"; and (iii) "Dignity Health['s] arrangement is 'unique.'" ER-506.[10] Petitioners informed the court of appeals

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[10] *See also* Defs.' Mot. for Partial Summ. J. at 16, Dist. Ct. Dkt. #137 ("The IRS has not yet issued a [private letter ruling] on the status of the Plan.").

that "[t]he IRS has advised that it is declining to review [its] request [for a private letter ruling] in light of this litigation." Br. of Defs.-Appellants at 8 n.4, C.A. Dkt. #16-1.

In any event, as the Ninth Circuit explained, these private letter rulings did not *analyze* the statute; they "relied upon and adopted the [IRS general counsel memorandum's] reading of the statute, without altering or expanding upon its analysis." Pet. 20a; *see also Advocate*, Br. in Opp'n pp. 18-19. Recipients of private letter rulings may be entitled to rely on such letters *vis-à-vis* the IRS with respect to the tax-qualification status of their benefit plans.[11] But petitioners cite no authority indicating that recipients of such letters—much less *other* entities like Dignity that have not received a current letter ruling—are entitled to rely on the informal, nonprecedential position of the IRS as a justification for denying plan participants the protections to which they are entitled under ERISA.

3. Petitioners' reliance on a 1995 settlement agreement between Dignity and the PBGC (Pet. 17-18) also is misplaced. The PBGC, in agreeing to refund Dignity's previously-paid PBGC premiums, did not issue any reliance-worthy determination regarding the Plan. Indeed, the PBGC made no determina-

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[11] *See* IRS Rev. Proc. 2016-1, §2.01, 2016 WL 20933 (Jan. 4, 2016) (a "letter ruling" is a response to a taxpayer's inquiry "about its status for tax purposes or the tax effects of its acts or transactions."); *id.* §11.01.

tion regarding church-plan status, but instead deferred to the informal position of the IRS as expressed in a then-extant non-precedential private letter ruling. ER-442-43. Dignity agreed not to make an *election* to comply with ERISA pursuant to IRC §410(d), Pet. 17-18 (citing ER-443-44), but that section applies only to legitimate church plans that choose to comply with ERISA. Where, as here, a plan does not satisfy the statutory definition of a church plan, ERISA compliance is not a matter of choice—the Plan must comply with ERISA.

4. In light of the above, the three cases cited by Dignity (at Pet. 19-20) over the last forty years in which the Court has granted certiorari to address reliance-inducing regulations and actions with nationwide effect are inapposite. *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 979-80 (1986); *Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974). All three cases involved the invalidation by a single court of appeals of a nationwide federal regulation (or the requirement that a regulation be promulgated) that was intended to be relied upon by private parties and that directly governed rights of the parties involved. Here, three different courts of appeals have ruled, without dissent, as to the meaning of the statute, while the government has *never* carefully examined the issue and explained its conclusion in a regulation or similar doc-

ument; has *disclaimed* private reliance on its opinions; and has never purported to issue opinions governing the ERISA rights of nonparty employees.[12]

5. Contrary to petitioners' submission (at Pet. 24), the need for national uniformity *supports* the courts of appeals' holdings. The law at present is uniform. Every circuit that has addressed this issue has reached the same result. That "many religious organizations operate in multiple states," Pet. 24, is a powerful reason why ERISA's uniform national regime should apply. Petitioners' position would subject those plans to the varying substantive and remedial laws of fifty different States—directly contrary to ERISA's overarching goal of nationwide uniformity. *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945 (2016); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001).

6. Petitioners contend that the "vast majority of benefit plans currently operated as church plans were

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[12] Although the Court has deferred to views of "'agencies responsible for enforcing ERISA,'" *see Beck v. PACE International Union*, 551 U.S. 96, 104 (2007) (citation omitted), it did so where the relevant statute was silent or ambiguous with respect to the specific issue and where the agency interpretation was set forth in a detailed, thirteen-page analysis that was "persuasive" and that offered the "better reading" of the statute. *Id.* at 105. Where, as here, no such thorough analysis is present and the interpretation is at odds with the plain language of the statute, no deference is due. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993).

not established by churches themselves." Pet. 18. This carefully worded assertion merely reflects the fact that hundreds of church-associated hospital conglomerates, often at the urging of benefit consultants, have in recent decades exploited a misreading of ERISA to lower their costs by claiming church-plan status for plans that had been operated— correctly— as ERISA plans. *See infra* p. 23.[13]

B. Further Delay of this Litigation Would Impose Severe Costs on Dignity's Employees

1. Imposition of minimum standards on pension plans and ensuring that employees actually get the benefits promised by such plans are essential goals of ERISA. *See* 29 U.S.C. §1001(a). As explained in the Brief in Opposition in *Advocate* (pp. 20-21), ERISA was enacted to redress a sadly extensive record of employees being left with little or nothing to show after years of reliance on an employer's promises of pension benefits. *See, e.g.*, *Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980). Non-ERISA plans pose the same risks today, as unfortunately demonstrated by the

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[13] This case does not present the question whether certain plans covering clergy were actually "established" by pension boards, Pet. 18-19, or whether instead, consistent with subsection 33(A), such plans were established by conventions or associations of churches with the *assistance* of pension boards. In petitioners' cited example, the Second Circuit explained that "[i]t is not in dispute that Concord established its health and pension plans and that Concord is a church[.]" *Coleman-Edwards v. Simpson*, 330 F. App'x 218, 220 (2d Cir. 2009).

failures of purported "church plans" that were operated by a number of hospital systems. *See Advocate*, Br. in Opp'n p. 21 & n.6 (citing further examples).

Petitioners cavalierly dismiss this as "gotcha" litigation. Pet. 21. No doubt Dignity would like to continue to save money on its pension plan by operating it in a substandard fashion and without insurance. But the employees left in the cold by the documented failures of similar allegedly non-ERISA "church plans" no doubt would see the issue differently. The complaint in this case alleges underfunding and other current deficiencies in Dignity's Plan, and those allegations must be accepted as true at this stage of the litigation.[14] In any event, the underfunding has no doubt gotten worse during the pendency of this case. Dignity's 2016 financial statement states that the projected benefit obligations for Dignity's pension plans exceed plan assets by *more than $1.7 billion*.[15]

Moreover, aside from the underfunding, Dignity's 2015 financial statement noted that in 2014, during the pendency of this litigation, Dignity amended the

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[14] The district court commented that plaintiffs had not yet proven that the Plan is underfunded and that petitioners had "put forward evidence" suggesting adequate funding. Pet. App. 70a. But the court did not resolve that dispute.

[15] *See* 2016 Financial Statement, *supra* note 3, at 30 (table showing "[f]unded status" of pension plans as negative $1,775,631,000).

Plan in a manner that has reduced its benefit obligation.[16] Without ERISA's protections and PBGC insurance, nothing would protect Dignity's employees from substandard substantive provisions, a lack of proper reporting and disclosure, and an ultimate risk of plan failure.

2. Petitioners argue that the impact of requiring them to comply with ERISA "could be catastrophic and irreversible." Pet. 2. Because the extent of petitioners' ERISA violations and the scope of necessary relief have not yet been litigated or resolved, petitioners' contentions at this interlocutory stage are pure speculation. As explained in the Brief in Opposition in *Advocate* (pp. 23-24), petitioners' assertions that they would be forced to make "irreversible" changes and would incur other costs of compliance (Pet. 16, 20) are vastly overstated. Rather, ERISA compliance would require Dignity to operate its Plan in accordance with the requirements that Congress deemed necessary to ensure the security of employees' pensions. Virtually all employers in this country comply with ERISA, without any apparent "catastrophe" or injury.[17]

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[16] *See* http://bit.ly/2d6eWc2 (financial statement) at 32.

[17] Petitioners claim that ERISA compliance "could force some organizations to stop offering defined benefit plans entirely." Pet. 20. They are of course speculating about *other*, unspecified plans, because they have admitted that Dignity itself "is not asserting that it is likely to drop its defined benefit plan in the event that it is forced to comply with ERISA." *Dignity*, Appl. to

Petitioners' claim that compliance with ERISA would be "irreversible" (Pet. 2, 16, 20)—*i.e.*, that the Plan could not become a "church plan" if the decision of the court of appeals were ever reversed—has been refuted by its own conduct and the conduct of many other plans. Dignity originally operated the Plan under ERISA for several years, until it decided to make the assertedly "irreversible" switch to claim church-plan status. *See* Pet. App. 51a-52a. The employer in *Saint Peter's* operated under ERISA for more than 30 years before making the same change. 810 F.3d at 177-78. Indeed, the PBGC has reimbursed hundreds of plans for previously paid premiums when, after years of operating as ERISA plans, they made the supposedly "irreversible" switch to claim church-plan status.[18] Petitioners' claim that complying with ERISA is "irreversible" is wrong.

C. Petitioners' Exaggerated Claims of Injury from Allowing this Litigation to Continue Are Without Merit

Petitioners' other arguments are without foundation.

1. Petitioners state that Dignity "is a nonprofit entity" and that "[i]n 2014, it provided $2 billion in char-

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Stay or Recall the Mandate, at 24. Such speculation, which is entitled to no weight, is addressed in the Brief in Opposition in *Advocate* (p. 24).

[18] *See, e.g.*, *Status of Church Plan Refund Requests*, http://bit.ly/2ebMMfb (262 PBGC refunds from 1991 to 2005).

itable care to the poor and underserved." Pet. 21. Petitioners argue that protecting Dignity's employees under ERISA "would come at the expense of destitute citizens of California, Arizona, and Nevada who rely on the free care and other free services that Dignity Health provides." Pet. 21.

Dignity's $2 billion in charitable care is comparable to the contributions of its competitors that do comply with ERISA. Dignity's $2 billion in benefits, which included unpaid costs of Medicare, was about 18.5% of the $10.7 billion in revenues on its 2014 financial statement.[19] Similarly, Stanford Health Care's $517 million in community benefits was about 17.3% of its revenues of $3 billion in 2014.[20] Cedars-Sinai Medical Center's $743 million in community benefits was about 25.3% of its revenues of $2.9 billion in 2014.[21]

In fact, federal laws require all nonprofit, and most for-profit, hospitals to provide community benefits in various forms. *See Advocate*, Br. in Opp'n p. 27. Laws in many states, including California, also require nonprofit hospitals to provide charitable care and other community benefits to justify their tax-exempt status. *E.g.*, Cal. Health & Safety Code §127340(a) ("social obligation to provide community benefits"), §127345(c) (listing examples of community

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[19] *See* http://bit.ly/2dfMCSA (financial statement).

[20] *See* http://shc.is/2dzYvUX (community benefits); http://shc.is/2dNACvW (financial statement).

[21] *See* http://bit.ly/2e0EMiC (financial statement).

benefits), §127400-46 (financial assistance requirements). Dignity must provide these community benefits regardless of the ERISA status of its pension plans.

2. Petitioners' other claims should be rejected. Petitioners argue that Dignity faces "over $7.2 billion in penalties" for just one year. Pet. 21. But ERISA penalties are authorized "in the court's discretion." 29 U.S.C. §1132(c)(3). Petitioners offer no example of such a massive penalty award in an ERISA case, and they presumably believe that it would be a clear abuse of discretion to award such a penalty here. In any event, petitioners' concerns are entirely premature in this interlocutory posture.

III. PETITIONERS' PLAN IS NOT A "CHURCH PLAN"

For all the reasons given by the Third, Seventh, and Ninth Circuits, the terms of the statute make clear that a plan that was not established by a church is not an ERISA-exempt "church plan." Those courts correctly rejected petitioners' arguments to the contrary.

A. The Text and Legislative History Both Make Clear that a Church Plan Must Be "Established" by a Church

1.a. Petitioners' core argument is that, in determining church-plan status, Congress intended to make the identity of the entity that "maintained" a plan critical and the identity of the entity that "established" it irrelevant. Yet if that were Congress's intent, it would have either eliminated the "established by" requirement, or at least made it optional rather

than mandatory. A neighboring provision that exempts plans "established *or* maintained" by a government does make the "established by" requirement optional. 29 U.S.C. §1002(32) (emphasis added); *see id.* §1003(b)(1). But Congress took a different approach here. Petitioners offer no reason why Congress would have required churches themselves to "establish and maintain" a church plan, but then have jettisoned the "establish" requirement when it came to secondary, non-church organizations. Congress also would not have allowed a new type of entity to "establish" a plan through a provision that merely addresses which entities can "maintain" a plan.

There is an additional anomaly that results from petitioners' reading. Petitioners' contention that a church plan can be "established" by a church-associated hospital is based on subsection 33(C)(i), which permits plans to be "maintained" by organizations "controlled by or associated with a church" *only if* such organizations have a "principal purpose or function" of "the administration or funding" of benefit plans. *Id.* §1002(33)(C)(i). A church-associated hospital plainly does not satisfy this principal purpose requirement. Petitioners offer no explanation of why Congress would have authorized a church-associated hospital to establish its own church plan while at the same time *forbidding the hospital itself to maintain the plan. Id.*

b. The error in petitioners' position is illustrated by an example given by the Third Circuit, which the

Ninth Circuit also employed.[22] The Third Circuit hypothesized a statute offering free insurance to a "person who is disabled and a veteran" and an amendment providing that "a person who is disabled and a veteran includes a person who served in the National Guard." *Saint Peter's*, 810 F.3d at 181; *see* Pet. App. 10a-11a. The court inquired whether under those provisions a non-disabled Guardsman would be entitled to free insurance. *Saint Peter's*, 810 F.3d at 181. The hospital in *Saint Peter's* correctly answered no. The court's hypothetical is directly parallel to the statute at issue here.

The Ninth Circuit's conclusion—that the amendment altered the meaning of "veteran" but not the requirement that recipients of free insurance be "disabled"—was not based on "an intuition," *contra* Pet. 26, but instead was compelled by the text of the amendment (which, like subsection 33(C)(i) here, altered only one of the original two necessary conditions). Although Congress in the hypothetical likely viewed disability as essential to qualify for free insurance, Congress here viewed the church's establishment of the

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[22] Petitioners' complaint that the Ninth Circuit did not sufficiently explain its textual analysis (at Pet. 25), or that it somehow disagreed with the analysis of the Third and Seventh Circuits (Pet. 26), is wrong. The court appropriately relied on the thorough analyses by the district court, *see* Pet. App. 8a, ("we agree with the district court"), and the Third and Seventh Circuits, *see* Pet. App. 10a-11a, and also provided its own analysis of textual differences between the church-plan definition and other statutes. Pet. App. 15a-18a.

plan as essential for the exemption. After all, the exemption here is for "church plans," not "religious plans." To ensure that the exemption applies only to a church's plan, Congress provided that the church must "establish" the plan for its employees, even if another entity "maintains" it. Congress, which retained the definitional "establish and maintain" provision when it amended the statute, had no intent to grant a wholesale exemption to giant non-church businesses like Dignity, the costs of which would be borne by Dignity's employees and secular competitors.

Petitioners rely (Pet. 25) on a district court opinion attempting to analogize this case to the syllogism that "'if A is exempt and A includes C, then C is also exempt.'" *Overall v. Ascension*, 23 F. Supp. 3d 816, 828 (E.D. Mich. 2014) (citation omitted). On its face, however, the analogy fails. The statute here has not one but two requirements ("established and maintained"). And, of course, the context of a provision, not just its abstract grammar, is critical in matters of statutory interpretation. The court of appeals' example of the disabled-veteran statute provides the correct analogue to the actual statute at issue here.

c. Petitioners argue that the decisions of the courts of appeals render superfluous the use of the term "established" before "includes" in subsection 33(C)(i). Pet. 25. As discussed in the Brief in Opposition in *Advocate* (p. 29), however, that argument is based on an incomplete quotation of the statute. As the Third, Seventh, and Ninth Circuits all held, nothing about the structure or context of the language indicates the basic requirement that a church plan be established by a church has fallen by the wayside.

d. Petitioners argue that three other federal statutes support its position. Pet. 26-28. One statute provides that the YMCA's pension plans will be "treated as a church plan ... which is maintained by an organization described in [§1002(33)(C)(i)]," Pub. L. No. 108-476, §1, 118 Stat. 3901 (2004). Petitioners puzzlingly argue that the YMCA "statute thus clarifies that association with Christianity generally is sufficient under subparagraph (C)(i), and declares that the plan is exempt *because* it is maintained by a (C)(i) organization, though it is undisputed that the plan was not established by a church." Pet. 27.

The YMCA statute does not "clarif[y] that association with Christianity generally is sufficient under subparagraph (C)(i)." The statute clarifies only that Congress wanted plans maintained by one particular organization (the YMCA) to be "treated as" church plans even though they did not satisfy the church-plan definition. That means that the YMCA plans are free from several different requirements otherwise applicable to church plans: a YMCA plan need not be established by a church; a YMCA plan need not cover employees of a church or an organization controlled by or associated with a church; and a YMCA plan need not be maintained by a "principal purpose" organization. No analogous statute provides that plans established by organizations such as Dignity shall be "treated as" church plans in any of these respects. Yet petitioners' entire argument is to read the "treated as" language from the YMCA statute into the very differently worded statute at issue here.

Petitioners' argument (Pet. 28) about two tax and securities statutes is equally meritless. Petitioners

criticize the court of appeals for construing the definition of a "[r]etirement income account[] provided by [a] church" in these statutes, *e.g.* 28 U.S.C. §403(b)(9), differently than the definition of a "church plan" under ERISA.[23] Petitioners characterize differences between these definitions as "minor wording changes" or a "minor discrepancy." Pet. 28. But the "wording changes" and "discrepanc[ies]" make clear that Congress sought to define a "retirement income account" in the tax and securities statutes differently from a "church plan." Specifically, a "retirement income account" is defined using the disjunctive "established *or* maintained" formulation, 26 U.S.C. §403(b)(9)(B) (emphasis added); *see* 15 U.S.C. §77c(a)(2) ("establishing or maintaining"), rather than the conjunctive "established *and* maintained" formulation in the church-plan definition. The court of appeals correctly refused to "construe terms to have the same meaning when Congress expressly define[d] the terms differently." Pet. App. 17a.

2. Each of the courts of appeals to consider the issue have thoroughly canvassed the legislative history and concluded that the history makes clear Congress's intent to extend church-plan status to churches that, having established plans, use pension-

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[23] The court of appeals did not conclude that the Plan "qualifies [as] a church plan for purposes of" the securities and tax statutes. *Contra* Pet. 28. For one thing, the Plan is not a "defined contribution" plan, as required to qualify as a "retirement income account" under these statutes. Moreover, nothing in the statute purports to treat a "retirement income account" as a "church plan" for *any* purpose.

boards and the like to maintain them. *See, e.g.*, Pet. App. 15a ("Nor is there anything in the legislative history of subparagraph (C)(i) to suggest that Congress intended, in broadening the definition of organizations that are authorized to maintain a church plan, to eliminate [the church-establishment] requirement."); *Advocate*, 817 F.3d at 529 ("[N]o part of [the legislative] record suggests an intent to allow a church-affiliated corporation to claim the exemption for a plan unless the church itself has established the plan, as required by the original definition of a church plan in subsection (33)(A) of ERISA."); *Saint Peter's*, 810 F.3d at 185 ("St. Peter's ... has not pointed to a single statement showing that Congress, in addition to being concerned about the sunset provision and plans maintained by pension boards (*i.e.*, church agencies), was also focused on plans *established* by those agencies."). As discussed in the Brief in Opposition in *Advocate* (pp. 30-33), the courts of appeals were correct.

Petitioners argue that the court of appeals "simply ignore[d] ... express statements in the legislative history about establishment by pension boards." Pet. 29. They cite three statements. Pet. 28-29. Two of them (quoted at Pet. 29) discuss plans *maintained* by a pension board, but do not say anything about who *established* the plans and are therefore unhelpful to petitioners. Petitioners do cite (at Pet. 28) one statement by Senator Talmadge that noted that because many church plans "are administered by a pension board," "there is a question whether the plan is established by a church, as it must be, or by a pension board." 125 Cong. Rec. 10,052

(1979). At the time Senator Talmadge made that statement in 1979, however, the draft of what became the 1980 amendments expressly permitted pension boards—but not other church-associated organizations—to establish church plans. In the end, however, Congress did not adopt that version; when the proposed church-plan amendments were ultimately enacted, "the second 'established' was gone." *Saint Peter's*, 810 F.3d at 182; *Advocate*, 817 F.3d at 524. Petitioners ask the Court to read the statute as if that change were never made.

Notably, when Senator Talmadge proposed the final version of the amendment, he reiterated that his purpose was to accommodate "church plans which rather than being maintained directly by a church are instead maintained by a pension board maintained by a church." *Exec. Sess. of S. Comm. on Fin.*, 96th Cong. 40 (1980) (emphasis added); *see also* 126 Cong. Rec. 20,245 (1980) (statement of Sen. Talmadge) (addressing plans "maintained by separately incorporated organizations called pension boards"). Nothing in the legislative history suggests that Congress wanted to eliminate the "established by" requirement in subsection 33(A).

B. The Only Constitutional Problem in this Case Would Arise if Petitioners' View of the Statute Prevailed

1. The court of appeals' decision does not create any "constitutional doubts." Pet. 30. As explained in the Brief in Opposition in *Advocate* (pp. 33-34), no court has suggested that petitioners' constitutional

argument has merit, much less that it requires disregarding the clear meaning of the statute Congress enacted.

a. Petitioners argue that the court of appeals' decision will lead to a "morass," because it will be difficult to sort out whether entities establishing benefit plans qualify as "churches." Pet. 31. Petitioners state that this problem arises here because of their contention that the Plan was established by Catholic religious orders. Pet. 32. But the district court correctly granted summary judgment to respondent without encountering any "morass" or need to examine religious doctrine in any way. The court found that there was no genuine dispute of material fact that the Plan was not established by religious orders but instead was established by Dignity, which is undisputedly not a church. Pet. App 53a-59a. In any event, the court of appeals correctly concluded that an inquiry into religious doctrine is "not require[d] ... and it is not the inquiry that courts or agencies actually employ" in assessing whether an entity qualifies as a church. Pet. App. 24a (citing *Found. of Human Understanding v. United States*, 614 F.3d 1383 (Fed. Cir. 2010); *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304 (D.D.C. 1980)).

b. Just as with the "[n]umerous federal statutes [that] have long drawn the distinction between churches and other religious organizations," Pet. App. 22a, because the distinction is based on "'organizational form or purpose,'" there is no discrimination be-

tween religious denominations. *See* Pet. App. 23a (citations omitted). *Accord Advocate*, 817 F.3d at 531.[24] Moreover, as explained in the Brief in Opposition in *Advocate* (pp. 33-34), the church-establishment requirement does not have the effect of discriminating against congregational denominations.

2. The constitutional-doubt doctrine would come into play in this case only if the Court accepted *petitioners'* view of the statute. This Court has recognized that "the government may (and sometimes must) accommodate religious practices." *Corp. of Presiding Bishop of Church of Jesus Christ of the Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted). But it has also recognized that Congress may not act with no purpose other than simply "favoring ... religious adherents collectively over nonadherents," *Board of Education v. Grumet*, 512 U.S. 687, 696 (1994), especially if doing so would burden nonadherents, *Estate of Thornton v. Caldor*, 472 U.S. 703, 708-09 (1985).

As explained in the Brief in Opposition in *Advocate* (pp. 34-35), such a forbidden raw preference for religiously affiliated institutions is exactly what petitioners argue for here. The core purpose of the church-plan exemption was to avoid "examination of books

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[24] Petitioners contend (Pet. 31) that this case is akin to *Larson v. Valente*, 456 U.S. 228, 244 (1982), but the statute at issue in *Larson* treated "religious organizations" of some denominations differently than others, and the legislative history reflected "the explicit intention of including particular religious denominations and excluding others." 456 U.S. at 254.

and records" that "might be regarded as an unjustified invasion of the confidential relationship ... with regard to churches and their religious activities." S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. That purpose, however, could not justify an exemption for Dignity, since Dignity already participates in Medicare and Medicaid and issues tax exempt bonds, all of which require it to disclose its financial records and relationships in great detail. *See* ER-835-36 (Compl. ¶52). Moreover, granting ERISA exemptions to Dignity has an additional defect, because it imposes substantial costs on nonadherents, such as Dignity's employees and competitors. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."); *United States v. Lee*, 455 U.S. 252, 261 (1982). Far from creating constitutional doubt, the court of appeals' decision removes it.

3. The constitutional-doubt doctrine thus provides an additional reason why this Court should deny certiorari. There is no basis for petitioners' constitutional-doubt argument. Nonetheless, granting certiorari in this case could easily require the Court to address the constitutional arguments advanced by one side or the other. In a case like this one that is in an interlocutory posture and in which there is no conflict in the circuits, prudence dictates that the Court should avoid a grant of review that could easily require an unnecessary constitutional determination.

IV. THIS CASE IS IN ANY EVENT A POOR VEHICLE

Further review is also unwarranted in this case because this Court's review would be very unlikely to change the result in this case. Initially, the Court is unlikely to reverse the unanimous and well-reasoned decisions of the three courts of appeals that have addressed the issue. In addition, aside from the "established by a church" requirement, there are two alternative and independent statutory reasons why Dignity's Plan is not exempt from ERISA.

1. Subsection 33(C)(i) provides that, if not maintained by a church, a church plan must be "maintained by an organization ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits." 29 U.S.C. §1002(33)(C)(i). The "principal purpose or function" of Dignity, which "maintain[s]" the Plan, is to provide health care and related services, not to administer or fund a retirement plan. Accordingly, the Plan would not qualify as a church plan, even if the "established by a church" requirement were disregarded. The district court essentially recognized this point:

> Dignity's reading ... disregards the limiting language of [sub]section C(i) .... Dignity is a healthcare organization; its mission is the provision of healthcare, not the administration of a benefits plan. While its Retirement Plans Sub-Committee's purpose is plan administration, the statute does not say that the organization may have a subcommittee who deals with plan administra-

> tion. Rather, the statute dictates that [the] organization itself must have benefits plan administration as its "principal purpose," which Dignity plainly does not.

Pet. App. 35a-36a. *See also Saint Peter's*, 810 F.3d at 183 n.8.

2. The Plan also does not satisfy the requirement in subsection 33(A) that a church plan be maintained "for [the] employees" of a church. 29 U.S.C. §1002(33)(A). Subsections 33(C)(ii)(II) and (iii) define employees of a church to include employees of organizations "controlled by or associated with" a church.

Dignity has not claimed that it is currently "controlled by" a church. And following Dignity's substantial corporate reorganization in 2012, numerous official statements made clear that Dignity is not associated with the Catholic Church, including: (i) the Archbishop of San Francisco's declaration that Dignity's name "will not suggest a direct association with the Catholic Church" and that Dignity "will not be recognized as Catholic," ER-160; (ii) a statement of the Phoenix Diocese that Dignity is "secular," SR-126; and (iii) Dignity's Bylaws, which state that Dignity is "not subject ... to the ecclesial authority of the Roman Catholic Church." ER-171 (§3.3). *See supra* pp. 4-5. Dignity also is not "associated with" a church pursuant to the three-part test adopted by petitioners' own cases. *Compare Lown*, 238 F.3d at 548, *and Chronister*, 442 F.3d at 652-53, *with* ER-842-45 (Compl. ¶¶78-82).

3. Dignity's Plan accordingly would not be a church plan under ERISA, even if this Court held that

a church plan need not be established by a church. For that reason, too, further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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